No. 82-6645

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BUSTER FRANKLIN MERRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his involvement in a gambling enterprise did not constitute "conducting" an illegal gambling business within the meaning of 18 U.S.C. 1955.

1. Following a bench trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. 1/ He was sentenced to two years' probation. The court of appeals affirmed (Pet. App. 1-5).

1/ Petitioner was charged, together with twelve co-defendants, with both the substantive offense and conspiracy, 18 U.S.C. 371. After three days of their joint jury trial, eight co-defendants (the lessor of the gambling premises, the game operator, three dealers and three watchmen) pleaded guilty. Petitioner and four co-defendants then waived a jury for the rest of the trial. The trial court convicted petitioner on the substantive charge, acquitted him on the conspiracy charge, and acquitted the remaining co-defendants "because they were mere bettors whose actions were not proscribed by Section 1955" (Pet. App. 2).

The evidence at trial showed that between May 11, 1979, and April 19, 1980, the FBI maintained surveillance of the premises at 19733 Omira in Detroit because of suspected illegal gambling. The surveillance entailed court-authorized videotaping and recording of activity and conversations occurring inside the premises, and "clearly indicated that an illegal dice game was being operated every Monday and Friday night during the time period in question" (Pet. App. 1-2). Petitioner "regularly served coffee to bettors during gambling sessions," and he "usually stacked tables and chairs, swept the floors, cleaned ash trays and replaced the tables and chairs in preparation for future sessions" (id. at 2). 2/

On appeal, petitioner's sole contention was that those activities did not justify his conviction. He relied on language in United States v. Boss, 671 F.2d 396, 400 (10th Cir. 1982), stating that a person must perform a "necessary function for the illegal gambling business" in order to be convicted under Section 1955. The court of appeals rejected petitioner's argument, concluding (Pet. App. 3-4) that the "prevailing rule is that one 'conducts' a gambling business if that person performs any act, duty or function which is necessary or helpful in operating the enterprise" (emphasis in original) (citations omitted). The court, moreover, distinguished Boss on its facts (id. at 4-5).

2. Contrary to petitioner's argument (Pet. 3-11), the decision of the court of appeals was correct, does not conflict with Boss, and does not warrant further review.

2/ The only defense witness, one of petitioner's co-defendants, confirmed that petitioner engaged in the activities described above and testified that petitioner "possibly" acted as a dealer as well (Tr. 490-492).

First, the decision below is consistent with the principle recognized by this Court that Section 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor" (Sanabria v. United States, 437 U.S. 54, 70-71 n.26 (1978)), and with the decisions of the Fifth, Seventh and Eight Circuits on which the court of appeals relied. See United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); United States v. Tucker, 638 F.2d 1292, 1296 (5th Cir.), cert. denied, 454 U.S. 833 (1981); United States v. Greco, 619 F.2d 635, 638 (7th Cir. 1980); United States v. Reeder, 614 F.2d 1179, 1182 n.2 (8th Cir. 1980); United States v. Bennett, 563 F.2d 879, 882 n.4 & 883 (8th Cir.), cert. denied, 434 U.S. 924 (1977). 3/

Second, it is by no means certain that this case conflicts with the Tenth Circuit's decision in Boss. While the court in Boss expressed disagreement with the "necessary or helpful test," it distinguished cases adjudicated under that standard and approved the results reached in those decisions. (671 F.2d at 400 & n.5.)

In any event, this case presents no occasion for resolution of any conflict with Boss because, as the Sixth Circuit recognized, the two cases are factually distinguishable. Boss involved waitresses whose primary function was to serve drinks to the 200 to 400 patrons of a large dance hall and whose sole connection with the gambling business was serving drinks to the 25 to 30 dice players in a small adjoining "gambling room." The court concluded that, under those circumstances, the waitresses' relationship to the illegal gambling was "too attenuated for them to be counted * * * as persons who 'conduct' * * * the gambling business" under Section 1955 (671 F.2d at 402).

3/ This Court has recently denied certiorari in two cases in which petitioners alleged a conflict with Boss. James v. United States, No. 82-1262, cert. denied (Apr. 25, 1983); Rossano v. United States, No. 82-124, cert. denied (Oct. 18, 1982). In addition, the petition for a writ of certiorari in Colacurcio, supra, was denied shortly after the Tenth Circuit's decision in Boss.

Here, by contrast, petitioner's relationship with the gambling operation was much more substantial and direct. He not only served coffee to the gamblers, but he also prepared the premises for future gambling sessions. 4/ Moreover, as the court of appeals observed (Pet. App. 4-5), "unlike the situation in Boss," -- where the waitresses' primary obligation was to serve customers who had no connection with the illegal gambling -- petitioner "regularly worked for an enterprise whose sole purpose was to promote illegal wagering" and he "cannot reasonably claim that he unknowingly or unwittingly facilitated gambling."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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4/ As noted above (note 2, supra), there was also testimony from a co-defendant that petitioner "possibly" served as a dealer as well.